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No. 607

In the Supreme Court of the United States

OCTOBER TERM, 1942

THE BORDER LINE TRANSPORTATION COMPANY, *Petitioner*

v.

SAUL HAAS, *Collector of Customs*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

Petitioner's Reply to Brief of United States In Opposition

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Counsel for petitioner solicit the court's consideration of the following matter. While it is largely devoted to a reply to argument in the brief of the Solicitor General, there will be first inserted a Commerce ruling which was overlooked until after the petition was printed. Because it tends to show a protracted and unbroken departmental construction of RS 4382, and applies the rule of *fauces terrae* as fixing the dividing line between the sea and other tidal waters, as held by Circuit Justice Story, Judge Betts, and others, and because it brings into focus a region of frontier tidal waters probably larger than any previously discussed (Saint Lawrence River), it seems sufficiently im-

portant to justify calling the court's attention to it at this time. It is unpublished and is not in evidence, but judicial notice may be taken of it. *The Paquete Habana*, 175 US 677, 696, and cases cited It reads as follows:

> Department of Commerce,
> Bureau of Marine Inspection and Navigation,
> Washington, July 31, 1939
> Bureau memorandum no. 238
> (for distribution to Bureau employees only).
>
> To collectors of customs on the northern, northeastern and northwestern frontier:
>
> Subject: Dividing line between Saint Lawrence River and Gulf of Saint Lawrence.
>
> The port-examination commission of the Bureau of Customs has reported to this Bureau an apparent lack of uniformity on the northern, northeastern, and northwestern frontiers with respect to determining the fees which shall be levied and collected from the owners and masters of vessels navigating the waters of the northern, northeastern and northwestern frontiers of the United States otherwise than by sea, in accordance with the provisions of section 4382, R.S., as amended (46 U.S.C. 330).
>
> The difficulty seems to have arisen as a result of a lack of uniform determination as to what point should be assumed to be the dividing line between the mouth of the Saint Lawrence River and the Gulf of Saint Lawrence.
>
> Therefore, for the purpose of establishing a uniform practice in the carrying out of the provisions of section 4382, R.S, as amended, you are instructed to assume that a line drawn northward from the eastern end of Gaspe Peninsula constitutes the dividing

> line between the Saint Lawrence River and the high seas, for the purpose of the statute cited herein.
>
> R. S. FIELD, Director

The reference to "section 4382, R. S., as amended," includes the amendment of 1897 which, as noted in the petition (p. 3), abolished the entrance and clearance fees which RS 4382 had fixed for vessels:

> Navigating the waters of the northern, northeastern, and northwestern frontiers of the United States otherwise than by sea.

The essence of this directive is in recognition of the entire Saint Lawrence River as a frontier water "otherwise than sea."* The dividing line between the river and "the high seas, for the purpose of the statute cited," is placed at the mouth of the river, where it discharges into the gulf of the same name. That is, "sea" and "high sea" are regarded as synonymous, as contended by petitioner and as held so frequently by courts and departmental heads.

Further, the *fauces terrae,* as the ends of "a line drawn northward from the eastern end of Gaspe Peninsula," fix

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*The magnitude of the tidal area of what is probably the broadest river in North America is thus indicated in 19 Encyc. Brit. 840c: "At Point des Monts, 260 m. below Quebec, it is 26 miles wide, and where it finally merges into the Gulf of Saint Lawrence, 150 m. farther on, it is 90 m. wide, this stretch being broken by the large island of Anticosti."

Also (p. 841b), the tide, which is 19 feet at Quebec, continues as far inland as Three Rivers, about 500 miles from the ocean. And a glance at any map comprehending both regions shows the area of the Saint Lawrence to exceed that of Fuca Strait and all its connecting waters, north and south, for several hundred miles; and this is probably true also of Alaska.

the outer or seaward limit of the river mouth This also accords with judicial and departmental rulings.

Third, the ruling is a clarification or interpretation of Customs Regulations of 1931, in which article 208 mentions the "Saint Lawrence River" as an area within the scope of RS 4382. Thus, there is an unbroken series of decisions and regulations from the time of some of the earliest "sea" statutes to 1939.

Briefly, the pronouncements referred to in the last three paragraphs are:

a) *The Harriet*, 11 F. Cas. 588, in which Circuit Judge Story in 1840 held that a vessel was not "at sea" until it was *extra fauces terrae;* also, based on the same rule, explicitly or by implication, nearly a dozen other decisions which are cited in appendix C of the petition (p. ix).

b) Treasury Regulations of 1857, citing the *Harriet* case as authoritative as to certain sea statutes.

c) TD 19363, in appendix A of petition, interpreting the regulations of 1892 and holding Alaskan frontier waters to be favorably within RS 4382.

d) Regulations of 1915, which in effect held that all frontier waters, saline or fresh, were within RS 4382 as amended.

e) The Commerce ruling of 1936 (R. 66-8), tacitly applying the rule of *fauces terrae* to Passamaquoddy Bay and the lower Saint Croix river, between Maine and New Brunswick.

f) The Commerce ruling of 1939 above quoted, interpreting the regulations of 1931, particularly so far as

they specified the Saint Lawrence, and holding it to be wholly a frontier water "otherwise than sea," without distinction between the tidal or saline portion (about 500 miles) and the fresh-water portion (about 260 miles).

This authoritative, uniform, and repeated construction exceeds in duration that of any analogous case that diligence of counsel has discovered.

This ruling is favorable to petitioner's contention, in that (1) it recognizes the lack of local uniformity in collecting fees chargeable against vessels navigating frontier waters; (2) corrects that lack by defining the word "sea" with reference to inland tidal waters and high sea, and (3) establishes a dividing line (*fauces terrae*) between sea and non-sea, which is pertinent to all tidal waters along our entire Canadian frontier, including the involved waters of the northwestern frontier contiguous to Washington and British Columbia.

The following pages deal with the brief in opposition. Pertinent page numbers therein are noted at the beginning of most of the paragraphs below.

Page 6: Here is quoted the comment by Mr. Justice Story, in *The Harriet,* 11 F. Cas. 588, that:

> We all know that the sea embraces all tide waters on the coast of our country, and the bays thereof.

However, the brief attempts no reconciliation with the conflicting fact that, in explicitly *deciding* the meaning of the word "sea" in its context in the sea-fishery statutes, the court held that tide waters on the coast of Maine, apparently

including those of Muscongus Bay below the port of Saint George (nautical chart 1203, US Coast & Geodetic Survey), were not "Sea," because not *extra fauces terrae*. Where dictum and judgment are inconsistent, the latter prevails; and the petition cites twenty or more cases that are in harmony with the *Harriet* judgment (appendix C, pp. ix et seq.).

Page 6: Opposing brief says:

> Furthermore, on many of the voyages here involved the vessels crossed the line, fixed by the Secretary of Commerce for purposes of regulating navigation, "dividing the high seas from rivers, harbors, and inland waters." Act of Feb. 19, 1895, . . .

And footnote 8, same page, refers to a map at 33 Code of Fed. Reg., p. 490, as indicating:

> That a vessel proceeding to Victoria and other points on the east coast of Vancouver Island would cross the high-seas line fixed by the Secretary of Commerce.

This attempt to apply the rule of *in pari materia* to elucidation of RS 4382 is untenable for various reasons suggested below:

a) The meaning of the act of 1871 embodied in RS 4382 can not be deduced from the act of 1895, which does not define or otherwise indicate the meaning of any language found in the earlier act, but depends upon differentiations to be made by the Secretary of the Treasury (now Commerce).

b) Those differentiations are arbitrary and temporary and have little relation to the common meaning of the terms "high seas" and "inland waters". For instance, Deputy Collector Dam testified that the high-sea line had in 1938 been pushed oceanward from Dungeness Point to Angeles

Point (R. 71-2), and that an effort had been made to move it to Neah Bay (R. 74), which is close by the ocean end of Fuca Strait (chart, ex. 9, R. 58—31), but that "these waters are fairly rough" (R. 74).

c) Further illustration of departmental disregard of the literal meaning of the terms employed in the collisions act of 1895 is strikingly found in 33 Code Fed. Reg. p. 488, where the line between inland waters and high sea is depicted as running from West Quoddy Head near Lubec, Maine, to Cape Cod, without touching the mainland except for a short distance near Machias, and as going as far into the Atlantic as Mount Desert Rock, which is probably 25 to 30 miles from the mainland. Thus a wide zone of uninclosed, navigable tidal water is arbitrarily transposed from its literal status of high sea to a highly imaginative inland status, and what King Canute was unable to do in a small way with his scepter has been enormously transcended by a stroke of an administrative pen.

d) Further illustration of the vagueness and variability of the word "inland" as used in commerce regulations is found in the fact that the term "inland waters bordering on the United States," in the neutrality act of 1939, 22 USC 442 (f), was administratively interpreted as including Fuca Strait, without limitation.

e) An almost humorous turn is given to the government's contention that a vessel going from Puget Sound toward any Canadian point on waters between Vancouver Island and the mainland is navigating "by sea," when it crosses the line betweeen high seas and inland waters established for purposes of navigation; *for it is then actually entering waters even farther inland and going directly*

away from the "high sea" as that term is commonly understood (ex. 10, R. 77-8).

f) Further reference to 33 Code Fed. Reg. p. 490 reveals the material fact that the demarkation pertains only to American waters, and peters out at the boundary line, 49th degree north latitude, thus indicating the untenable concept that a vessel goes from inland waters to high seas upon crossing an international line. The explanation is that the regulations relate only to inland waters of the United States (33 CFR 302.3, p. 484). So there is no helpful analogy between the collisions act of 1895 and RS 4382, which does not cover domestic commerce, being specifically limited to the entry and clearance of vessels "direct from a foreign port" or "direct to a foreign port."

Pages 7-8: The frontier-waters statute, RS 4382, was enacted in 1871. The Seattle practice prior to 1897 is not shown, but after 1897 it was to construe the term "sea" as ~~not~~ including inland tidal waters. Opposing brief asserts that this administrative interpretation for the latter part of the period subsequent to 1871 "must be deemed to have had the approval of the collectors' superior officers in the Department of the Treasury," and that, "in the absence of some exceptional circumstances which do not appear, this consistent construction of the 1897 act by those charged with its administration should not be disturbed."

First, it is highly unreasonable to presume Treasury approval of the Seattle interpretation of the word "sea," when contrary to that of the Treasury as specifically evinced in TD 19363 and the regulations promulgated by that department in 1915, and also contrary to that of Judges

Story, Betts, Hough, and others, cited in the petition (appendix C, pp. ix et seq.).

Second, the "exceptional circumstances" suggested by the Solicitor General exist glaringly, where a local customs administrator is out of step with so many eminent jurists and departmental heads.

Of the six decisions by this court cited by the Solicitor General on this phase of the case, *not one is in point*, because in no instance had a local officer been a law unto himself in construing a general statute in disregard of administrative and judicial pronouncements. The decision below seems to be unprecedented in having in effect upheld such an extreme legal theory. There is no more reason why uniformity in one customs district should prevail, regardless of conflicting practice in other districts and of conflicting instructions by department heads, than that a long-continued judicial interpretation of a statute by federal courts in one circuit should be regarded as inviolable, regardless of inconsistent interpretations in a number of other circuits and by this court.

In *Ogden v. Maxwell* (CC SDNY 1855) 18 F. Cas. 613, construing the fee act of 1799, which seems to have been a precursor of RS 2654 applied by the defendant collector in this case, the contention that a customs charge should be upheld because based upon a "long-continued usage and practice in the collector's office" at the port of New York, was denied by Judge Betts for the excellent reason that it was unauthorized by statute.

In *Cochran v. Schell,* 1883, 107 US 617, the same statute was construed in regard to other kinds of charges which

seem to have been made at least as far back as 1857 (p. 617); that is, for 26 years prior to decision by this court. The charges were held to have been illegal. Whether the practice had existed at many ports or only at the port of New York is immaterial. If the latter, the case was analogous to the present one arising at the single port of Seattle; if the practice were general, the case in favor of the exactions was even stronger than the present one.

Pages 8-9: In regard to petitioner's alternative contention (pet., pp. 48-54) the Solicitor General refers to the fact that though the question was raised by the pleadings it was not argued in the instant case because it had been rejected by the court below in *Carriso v. US,* 106 F 2d 707, and asserts:

> Since the point was not pressed or passed upon below, it is not entitled to consideration here.

In a pertinent ruling by this court on January 4, 1943, in *Ex parte Williams,* 87 L. ed. adv. 293, it was said that it did not "appear that the question presented here had been considered on the merits by the supreme court of Nebraska in any prior proceedings." Here the mentioned point had been "considered on the merits" by the same circuit court of appeals, "in a prior proceeding" in which the same counsel appeared. As no good purpose could reasonably have been subserved by rearguing the matter in the court below, it is submitted that the Solicitor General's point is not well taken, especially as none of the three cases cited by him seem to be pertinent.

Page 9: The Solicitor General asserts that "there is no conflict of decisions," but makes no attempt to distin-

guish the *Harriet* case, *supra,* decided by an appellate court and flatly holding in a customs case that under the rule of *fauces terrae* inland waters were not "sea" as that term was used in a customs statute. That is undeniably in conflict with the decision in the instant case; and the same may be said of the 20-odd decisions cited in appendix C of the petition (p. ix), all of which are in harmony with the *Harriet* case, and some of which specifically follow it. Analogous is the direct conflict between the decision herein and the many statutes and treaties cited in appendix B (pet., p. ii), showing protracted and frequent legislative use of "sea" in a sense that excludes inland waters.

Page 9: It is also asserted by the Solicitor General that "there is . . . no question of general importance presented." We respond that, if the rule of *fauces terrae* was properly ignored by the court below in regard to the Washington-British Columbia sector, the same is true of the Alaska, Maine, and Saint Lawrence frontier tidal waters, of large aggregate importance, the status of which was settled by departmental rulings cited above and relating specifically to those areas, and should not be disturbed.

It is respectfully submitted that the petition for a writ of certiorari should be granted.

San Francisco, January 29, 1943.

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